

enforcement of that rule,⁸⁵ in response to a request by AMTA,⁸⁶ pending the Commission's disposition of AMTA's petition for reconsideration.⁸⁷ In this Order, we rule on AMTA's petition for reconsideration, which requests that the Commission extend that five-day time period to 60 days, based on the unavoidable nature of a temporary discontinuance of operation, and the onerous effect of a five-day cancellation in some instances. As examples, AMTA cites the discovery of the inadequacy of a site, due to either technical problems or business considerations. AMTA expresses concern that if the Commission does not share the licensee's view that its showing is sufficient to be out of operation for more than 60 days, then five days is inadequate to rectify the problem and reinstitute service.⁸⁸

65. The Omnibus Budget Reconciliation Act of 1993 requires the Commission to modify its rules, to the extent "necessary and practical," to ensure that substantially similar services are subject to "comparable" technical requirements.⁸⁹ Moreover, we concluded in the *CMRS Third Report & Order* that the 800 and 900 MHz SMR services compete or have the potential to compete with existing wide-area CMRS service providers.⁹⁰ We believe that we should modify our existing permanent discontinuance rule in accordance with the requirements for cellular and PCS to the extent practical. Therefore, we are modifying Section 90.631(f) to include provisions comparable to those contained in Section 22.317 for cellular operations. This will permit licensees to discontinue operations for 90 continuous days and removes any provisions for licensees to request an additional extension of this period. AMTA's concern about extending from five days to sixty days the period for reinstituting service, therefore, is no longer valid. Thus, we find AMTA's petition for reconsideration moot, and we will enforce Section 90.631(f), as modified herein.

B. MISCELLANEOUS MATTERS

1. Spectrum Cap and Attribution

66. In the *CMRS Third Report & Order*, we adopted a 45 MHz aggregate spectrum cap on CMRS uses within the three radio services, broadband PCS, cellular, and SMR.

⁸⁵ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Order*, 8 FCC Rcd 3974 (1993).

⁸⁶ AMTA Request for Stay, filed April 2, 1993.

⁸⁷ AMTA Petition for Reconsideration, filed April 2, 1993.

⁸⁸ AMTA Petition at 7-8.

⁸⁹ Budget Act, § 6002(d)(3), 107 Stat. 312 (1993).

⁹⁰ See e.g., *CMRS Third Report & Order* at ¶ 94.

Accordingly, an entity may hold up to 45 MHz of spectrum in the three services in any geographic area.⁹¹ For example, an entity may hold 5 MHz of 900 MHz SMR spectrum, a 30 MHz PCS, and a 10 MHz PCS license in the same area; or an entity may hold 10 MHz of SMR spectrum, a cellular license accounting for 25 MHz and a 10 MHz PCS license.

67. We also adopted a 20 percent cross-ownership attribution rule for purposes of the SMR, broadband PCS, and cellular spectrum aggregation limit.⁹² By this rule, an entity with 20 percent or greater ownership of a 900 MHz SMR license who has 40 MHz of broadband PCS spectrum in a geographic market would reach the spectrum cap with 5 MHz of SMR spectrum in an MTA within that geographic market. Although we stated that we would use the multiplier adopted in the *Broadband PCS Further Order on Reconsideration*,⁹³ in lieu of a bright-line test, to determine attribution when cellular, broadband PCS and SMR licensees are held indirectly through intervening corporate entities,⁹⁴ we have since refined and clarified our PCS rules with respect to the use of the multiplier.⁹⁵

68. We also adopted a 10 percent population overlap threshold, in which a provider's spectrum counts toward the cellular-PCS-SMR spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the MTA.⁹⁶ As indicated, all 900 MHz SMR channels count toward the limit.⁹⁷ Therefore, 900 MHz SMR operators who intend to aggregate across channel blocks must comply with the spectrum cap.

2. Grandfathering

a. Regulatory Classification

69. In the *CMRS Second Report & Order*, the Commission stated that SMR licensees

⁹¹ *Id.* at ¶ 263.

⁹² *Id.* at ¶ 276.

⁹³ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Further Order on Reconsideration*, GEN Docket No. 90-314, 9 FCC Rcd 4441 (1994) (*Broadband PCS Further Order on Reconsideration*).

⁹⁴ *CMRS Third Report & Order* at ¶ 276.

⁹⁵ Amendment of the Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band, *Memorandum Opinion and Order*, GEN Docket No. 90-314, FCC 95-92 (rel. March 3, 1995).

⁹⁶ *CMRS Third Report & Order* at ¶ 279.

⁹⁷ *Id.* at ¶ 280 (explaining calculation of attributable SMR spectrum).

are classified as CMRS if they offer interconnected service, and are otherwise classified as PMRS.⁹⁸ All 900 MHz MTA licensees presumptively will be classified as CMRS providers.⁹⁹ Consistent with the *CMRS Third Report & Order*,¹⁰⁰ however, the presumption will not be applied before August 10, 1996 to an MTA licensee who was an incumbent in the 900 MHz service before August 10, 1993. As such, these licensees are not subject to CMRS regulation for three years from the enactment date under the Budget Act's grandfathering provision.¹⁰¹

b. Foreign Ownership Waivers

70. Section 332(c)(6) of the Communications Act permits the Commission to waive the application of Section 310(b) to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier, as a result of the Budget Act, on the condition that the extent of foreign ownership not increase above the pre-May 24, 1993 level, and that no subsequent transfer of ownership is made to anyone in violation of Section 310(b).¹⁰² As a result of our decision to treat incumbent licensees as new applicants for purposes of competing for an MTA license, the question arises as to whether a waiver filed by an incumbent licensee will cover the MTA license, in the event that the incumbent wins the MTA license.¹⁰³

71. We will grandfather any timely-filed waiver petitions¹⁰⁴ with respect to the MTA license filed by an incumbent within the MTA. Although the MTA license is considered a "new" license, the existing facilities of the provider will be entirely subsumed in the new license. Thus, we believe it is unnecessary to require an additional filing by an incumbent who wins the MTA license.

⁹⁸ *CMRS Second Report & Order* at ¶¶ 82-109.

⁹⁹ *See id.* at ¶¶ 88-93; *CMRS Third Report & Order* at ¶ 30.

¹⁰⁰ *CMRS Third Report & Order* at ¶ 9.

¹⁰¹ Budget Act, § 6002(c)(2)(B)(1993); 47 U.S.C. § 332(c)(2)(B).

¹⁰² Budget Act, § 6002(b)(6)(1993); 47 U.S.C. § 332(b)(6).

¹⁰³ For example, on February 8, 1995, Geotek filed a waiver of Sections 310(b)(3) and 310(b)(4) of the Act to permit it, its subsidiaries, and affiliates to retain certain foreign officers and directors, which remains pending.

¹⁰⁴ Under 47 U.S.C. § 332(b)(6), waivers had to be filed within six months after the date of enactment of the Budget Act, *i.e.*, February 10, 1994. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994) at ¶ 15.

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING: AUCTION RULES

A. Competitive Bidding

72. In the *CMRS Third Report & Order*, the Commission determined that it would use competitive bidding to select from among mutually exclusive applicants in the 900 MHz SMR service.¹⁰⁵ Accordingly, under our auction authority, if mutually exclusive applications for an MTA 10-channel block are accepted for filing, we will award that license through competitive bidding. We request comment on specific bidding procedures, as set forth below.

1. Competitive Bidding Design for 900 MHz SMR

73. In the *Auctions Second Report & Order*, we established the criteria to be used in selecting from among auction methodologies to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly would foster Congress's policy objectives. We noted there that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. We also stated that: (1) licenses with strong value interdependencies should be auctioned simultaneously and (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.¹⁰⁶ Thus, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.¹⁰⁷

74. Based on the factors identified in the *Auctions Second Report & Order*, we tentatively conclude that simultaneous multiple round auctions are appropriate for the 900 MHz SMR service.¹⁰⁸ As in the case of PCS,¹⁰⁹ the 900 MHz SMR licenses are

¹⁰⁵ *Id.* at ¶ 337.

¹⁰⁶ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Auctions Second Report & Order*) at ¶ 69.

¹⁰⁷ *Id.* at ¶¶ 109-111.

¹⁰⁸ Both RAM and Geotek support this design. RAM *Ex Parte* Presentation, filed Dec. 19, 1994, at 11; Cf. RAM/Geotek Joint *Ex Parte* Presentation at 4.

interdependent, and licensees likely will aggregate and substitute across spectrum blocks and geographic regions. Therefore, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient aggregation of licenses across spectrum bands. We seek comments on this tentative conclusion.

75. We note, however, that the presence of incumbents on certain channels could affect the relative desirability and value of otherwise identical MTA licenses in ways we do not anticipate. In the event that the short-form filings indicate that particular 900 MHz licenses are not substantially interdependent, we propose to delegate authority to the Wireless Telecommunications Bureau to revisit the issue of whether another auction design would be more appropriate. Under this proposal, the bidder's package would include information about available spectrum on each channel block within each MTA.

2. License Grouping

76. The Commission determined in the *Auctions Second Report and Order* that in a multiple round auction, highly interdependent licenses should be grouped together and put up for bid at the same time because such grouping provides bidders with the most information about the prices of complementary and substitutable licenses during the course of an auction.¹⁰⁹ We also determined that the greater the degree of interdependence among the licenses, the greater the benefit of auctioning a group of licenses together in a simultaneous multiple round auction.¹¹¹

77. RAM and Geotek, the two largest incumbents in the 900 MHz SMR service, question whether it is practical to hold a simultaneous auction of all MTA licenses given the aggregate number of licenses to be auctioned. They suggest that we auction the licenses on an MTA-by-MTA basis, starting with the most densely populated MTA and ending with the least densely populated MTA, or that we group the MTA licenses by region for auction purposes.¹¹²

78. We tentatively conclude that all 51 MTAs in the 900 MHz SMR band should be

¹⁰⁹ We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband PCS licenses. See *Auctions Fifth Report & Order* at ¶¶ 27-32 (broadband PCS); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941 (1994)(*Auctions Third Report & Order*) at ¶¶ 17-21 (narrowband PCS).

¹¹⁰ *Auctions Second Report & Order* at ¶¶ 106-107.

¹¹¹ *Id.* at ¶¶ 89-94; *Auctions Fifth Report & Order* at ¶ 36.

¹¹² RAM/Geotek Supplementary Joint *Ex Parte* Presentation, filed Feb. 10, 1995, at 1.

auctioned simultaneously, but seek comment on the proposals discussed above. Although grouping the licenses together may be somewhat more costly from an administrative viewpoint than breaking the licenses into groups, we believe that the added cost will be outweighed by the informational and bidding flexibility advantages afforded by a single auction.¹¹³ The 900 MHz service may not present the same obstacles in this regard as the broadband PCS service, in which we determined that despite the high degree of interdependence among all broadband PCS licenses, a single simultaneous auction would be too costly and complex.¹¹⁴ The 1,020 licenses to be auctioned in the 900 MHz SMR service are less than half the number of broadband PCS licenses to be auctioned in Blocks A through F, and unlike broadband PCS, all licenses will be for the same amount of spectrum and will use a single service area definition. Therefore, we tentatively conclude to hold a single auction, while reserving the discretion to inform applicants by Public Notice if we determine to hold more than one auction, on the basis that a single auction proves administratively difficult. We seek comment on this issue.

B. Bidding Issues

1. Bid Increments

79. As we have done in previous multiple round auctions, we propose to establish minimum bid increments for bidding in each round of the auction.¹¹⁵ The bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as valid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period of time. Establishing an appropriate minimum bid increment is important in a simultaneous auction with a simultaneous closing rule, because all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.

80. Consistent with our PCS auction procedures, we propose to start the 900 MHz auction with relatively large bid increments, and adjust the increments as bidding activity indicates. The minimum bid increment in Stage I of the auction generally would be five percent of the high bid in the previous round or \$.02 per MHz-pop, whichever is greater. In Stage II, we propose to reduce the minimum bid increment to the greater of five percent or \$.01 per MHz-pop, and in Stage III, the bid increment would remain at the greater of five percent or \$.01 per MHz-pop. We propose to retain the discretion to vary the minimum bid increments for individual license or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid

¹¹³ The Commission may conclude instead that running a single auction, rather than multiple auctions is actually administratively *less* costly.

¹¹⁴ *Auctions Fifth Report & Order* at ¶ 36.

¹¹⁵ *See, e.g., Auctions Third Report & Order* at ¶¶ 30-32.

amounts. We propose to retain the discretion to keep an auction open if there is a round in which no bids or proactive waivers are submitted. (See discussion of stopping rules at ¶¶ 81-85, *infra*)

2. Stopping Rules

81. In multiple round auctions, a stopping rule must be established for determining when the auction is over.¹¹⁶ In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under a license-by-license approach, bidding closes on each license after a certain number of rounds pass in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding remains open on all licenses until there is no new acceptable bid for any license. This approach provides bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions unless an activity rule is imposed. Under a hybrid approach, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use the license-by-license approach.

82. For 900 MHz SMR, we propose to adopt a simultaneous stopping rule. MTA licenses are expected to have relatively high values because of the substantial amount of clear spectrum that remains available and the high valuation of SMR spectrum in secondary market transactions. The substitutability between licenses within the same MTA, and the ability to pursue back-up strategies also support the proposal to use a simultaneous stopping rule. Additionally, using MTAs rather than BTAs or other more numerous service areas should reduce the complexity of implementing a simultaneous stopping rule. Because we propose to impose an activity rule (as discussed at ¶¶ 87-93, *infra*), we believe that allowing simultaneous closing for all licenses should afford bidders flexibility to pursue back-up strategies. We seek comment on this issue.

83. In the event we adopt a simultaneous stopping rule, we will retain the discretion to announce at any time during the auction that the auction will end after a specified number of additional rounds. If we adopt this proposal, bids would only be accepted on licenses where the high bid has increased in the last three rounds.¹¹⁷ This proposal would deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It would also enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed likely benefits of continuing to allow bidding. If this mechanism is used, the number of remaining rounds and other final bidding procedures would be announced by public notice. We also propose to retain the

¹¹⁶ *Id.* at ¶ 128.

¹¹⁷ *Auctions Fifth Report & Order* at ¶ 49.

discretion to conduct market-by-market closings, if circumstances so warrant. We seek comment on this issue.

84. The disadvantages of declaring an imminent end to an auction, however, are that the procedure may result in less efficient allocation of licenses than if the auction remained open as long as new bids were received.¹¹⁸ Therefore, we propose to declare the imminent end of the auction only in the case of extremely dilatory bidding, as we favor other methods to hasten the end of an auction -- shortening the bidding rounds, raising the minimum bid increments, and proceeding to a later auction stage.¹¹⁹ We seek comment on this issue.

85. In the *Fourth Memorandum Opinion & Order*, we determined that we will keep an auction open in a round in which no new acceptable bids are submitted if we receive a "proactive" waiver of the activity rules.¹²⁰ (See discussion of activity rule waivers at ¶¶ 87-93, *infra*). With respect to the broadband PCS auctions, we later modified the rule by retaining the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.¹²¹ We propose to employ the same procedure with respect to the 900 MHz SMR auctions. This would facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a premature auction close.¹²² We seek comment on these issues.

3. Duration of Bidding Rounds

86. We propose to reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run more than one round per day) in order to move the auction toward closure more quickly. Under this proposal, we would announce any changes to the duration of and intervals between bidding rounds either by public notice prior to the auction or by announcement during the auction. We seek comment on this issue.

4. Activity Rules

87. As discussed above, in order to ensure that simultaneous auctions with

¹¹⁸ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (*Auctions Fourth Memorandum Opinion & Order*) at ¶ 20.

¹¹⁹ *Id.*

¹²⁰ *Id.* at ¶ 15.

¹²¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684 (1994) at ¶ 3.

¹²² *Id.* at ¶ 5.

simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Auctions Second Report & Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.¹²³ The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment equal to \$.02 per MHz-pop.¹²⁴ (See discussion of upfront payments at ¶ 107, *infra*) In each round, bidders are limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder from the previous round, as well as licenses on which a new valid bid is placed, count toward this MHz-pop limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid.

88. We tentatively conclude that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule to award 900 MHz SMR licenses. This proposal would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Under the Milgrom-Wilson procedure, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, increases during the course of the auction. Absent waivers (discussed *infra*), a bidder's eligibility (in terms of MHz-pops) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by \$.02 per MHz-pop. We seek comment on this issue.

89. During Stage I, we tentatively conclude that a bidder must be active on licenses encompassing one-half of the MHz-pops for which it is eligible. In Stage II and Stage III, we tentatively conclude that the bidder must be active on 75% and 95%, respectively, of the MHz-pops for which it is eligible. Under this proposal, the "penalty" for falling below the minimum activity level at any stage would be a reduction in maximum eligibility to bid in future rounds. For example, in Stage I, the penalty for falling below that activity level would be the loss of 2 MHz-pops in eligibility for each MHz-pop that the bidder falls below the minimum required activity level. As in prior auctions, we propose to determine the transition from one stage to the next in the 900 MHz SMR auction by the aggregate level of bidding activity, subject to our discretion. The transition rule may also be defined in terms of

¹²³ *Auctions Second Report & Order* at ¶¶ 144-145.

¹²⁴ The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

the "auction activity level" -- the sum of the MHz-pops of those licenses whose high bid increased in the current round, as a percentage of the total MHz-pops of all licenses in that auction. Under our proposal, the auction would start in Stage I and move to Stage II when, in each of three consecutive rounds of bidding, the high bid has increased on 10 percent or less of the spectrum (measured in terms of MHz-pops) being auctioned. Similarly, the auction would move to Stage III when the high bid has increased on five percent or less of the spectrum being auctioned in each of three consecutive rounds of bidding in Stage II. We seek comment on these proposals.

90. Moreover, if we adopt this proposal, we reserve the discretion to increase or decrease these activity levels, as well as to vary the timing of stages and activity levels for each stage through public notices issued after applications are filed and before the auction begins, as circumstances warrant. In addition, we would retain the discretion during the auction to change stages.

91. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we propose to implement a procedure for waiver of the activity rule. In the *Fourth Memorandum Opinion & Order*, we stated that the Commission retained the discretion to modify the method and timing of submitting waivers and to allow for two types of waivers -- "proactive" and "automatic."¹²⁵ As explained therein, proactive waivers invoked in a round in which there are no new valid bids will keep an auction open, while an automatic waiver submitted in a round in which no other bidding activity occurs will not keep an auction open.¹²⁶ Proactive waivers are submitted by the bidder while automatic waivers would be submitted automatically for a bidder whenever a bidder's eligibility would be reduced because of insufficient bidding activity and a waiver is available unless the bidder specifically chooses not to have the automatic waiver apply.¹²⁷ Automatic activity rule waivers would be automatically applied by the bidding system in any round where a bidder's activity is below the requested activity level as long as the bidder has waivers remaining.

92. Under this proposal, we would announce by Public Notice how many waivers bidders will receive. A waiver would permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is applied. A waiver, however, could not be used to correct an error in the amount bid. This would ensure that bidders are not arbitrarily penalized by having their eligibility reduced due to an accidental act or circumstances not under the bidder's control. We seek comment on these proposals.

93. While we are proposing the adoption of the Milgrom-Wilson activity rule by this

¹²⁵ *Auctions Fourth Memorandum Opinion & Order* at ¶ 15.

¹²⁶ *Id.*

¹²⁷ *Id.*

Further Notice, we also retain the discretion to use an alternative activity rule for 900 MHz if we determine that the Milgrom-Wilson rule is too complicated or costly to administer.¹²⁸ Any such change would be announced by public notice before commencement of the auction.

5. Rules Prohibiting Collusion

94. In the *Auctions Second Report & Order*, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding.¹²⁹ We observed that such a rule would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.¹³⁰ We believe that this rule is appropriate for the 900 MHz SMR service. Therefore, we tentatively conclude that Section 1.2105(c) will apply to 900 MHz SMR auctions. The rule prohibits bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies, and also prohibits bidders from entering into consortium arrangements or joint bidding agreements after the deadline for short-form applications has passed.¹³¹ In the *Second Memorandum Opinion & Order*, we modified the rule so that bidders who have not filed Form 175 applications for licenses in any of the same geographic markets may enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction, because of the low risk of anticompetitive conduct among bidders that have not applied for licenses in any of the same geographic areas.¹³² Furthermore, in the *Fourth Memorandum Opinion & Order*, we noted that communications among bidders concerning matters unrelated to the license auctions would be permitted.¹³³ We seek comment on this proposal.

95. In addition, as discussed at ¶ 103, *infra*, bidders would be required by Section 1.2105(a)(2) to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders would be required to

¹²⁸ See *id.* at ¶ 144.

¹²⁹ See 47 C.F.R. § 1.2105(c).

¹³⁰ See *Auctions Second Report & Order* at ¶ 221.

¹³¹ 47 C.F.R. § 1.2105(c)(1).

¹³² 47 C.F.R. § 1.2105(c)(3).

¹³³ *Auctions Fourth Memorandum Opinion & Order* at ¶ 59. But see Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division, rel. Dec. 1, 1994 (establishing that discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules).

certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. We seek comment on this proposal.

96. We propose that winning bidders in 900 MHz SMR auctions be subject to Section 1.2107 of the Commission's Rules, which, *inter alia*, requires each winning bidder to attach as an exhibit to the Form 600 long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortium, joint venture, partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. Under this rule, all such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions. We seek comment on this proposal.

C. Procedural and Payment Issues

1. Pre-Auction Application Procedures

97. In the *Auctions Second Report & Order*, the Commission established general competitive bidding rules and procedures which we noted may be modified on a service-specific basis.¹³⁴ As discussed below, we propose to follow generally the processing and procedural rules established in the *Auctions Second Report & Order*, with certain modifications designed to address the particular characteristics of the 900 MHz SMR service. These proposed rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these proposed rules will minimize the need to re-auction licenses and prevent delays in the provision of 900 MHz SMR service to the public.

98. As MTA licensees will gain use of a large geographic area and the freedom to locate base stations anywhere within that larger geographic region, they differ from the existing 900 MHz licensees that are essentially confined to the smaller DFA region. Accordingly, we propose to treat all MTA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they are already incumbent operators.

¹³⁴ See 47 C.F.R. Part 1, Subpart Q.

99. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing."¹³⁵ Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to Section 309(a) and Section 308(b) and 310" of the Communications Act.¹³⁶ As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and we propose to dismiss applications not meeting those requirements prior to the competitive bidding.¹³⁷

100. In the *Auctions Second Report & Order*, we determined that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction. As we determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the *Auctions Second Report & Order*.¹³⁸ Accordingly, we propose to extend the application of these rules to the competitive bidding process for 900 MHz SMR.

101. Under this proposal, before the 900 MHz SMR auction, the Wireless Telecommunications Bureau would release an initial Public Notice announcing the auction. The initial Public Notice would specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice would specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment.¹³⁹ We would not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice would be returned as premature. Likewise, applications submitted *after* the deadline specified by Public Notice would be dismissed, with prejudice, as untimely. We seek comment on these proposals.

102. Soon after the release of the initial Public Notice, an auction information package will be made available to prospective bidders. The bidders' package will contain information on the incumbents occupying blocks on which bidding will be available.

¹³⁵ 47 U.S.C. § 309(j)(5).

¹³⁶ *Id.*

¹³⁷ See H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993) (House Report).

¹³⁸ See 47 C.F.R. §§ 1.2104, 1.2107.

¹³⁹ See *Auctions Second Report & Order* at ¶ 164.

Incumbents will be expected to update information on file with the Commission, such as current address and phone number, so that such information will be of use to prospective bidders.

103. Under this proposal, all bidders would be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), by the date specified in the initial Public Notice. Applicants would be encouraged to file Form 175 electronically. Detailed instructions regarding electronic filing would be contained in the Bidder Package. Those applicants filing manually would be required to submit one paper original and one microfiche original of their application, as well as two microfiche copies. The short-form applications would require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules.¹⁴⁰ Specifically, each applicant would be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust, or other), the markets and frequency blocks for which it is applying, and assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf.

104. As we indicated in the *Auctions Second Report & Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we propose to issue a Public Notice cancelling the auction for this license and establishing a date for the filing of a long-form application, the acceptance of which would trigger the procedures permitting petitions to deny (as discussed at ¶ 116, *infra*).¹⁴¹ If no petitions to deny are filed, the application would be grantable after 30 days. We seek comment on the proposals discussed above.

2. Amendments and Modifications

105. To encourage maximum bidder participation, we propose to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (*e.g.*, typographical errors, incorrect license designations, etc.) also would be permitted to file corrected applications. Recently, the Commission waived the *ex parte* rules as they applied to the submission of amended short-form applications for the A and B blocks of the broadband PCS auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments. We

¹⁴⁰ 47 C.F.R. § 1.2105(a)(2).

¹⁴¹ See *Auctions Second Report & Order* at ¶ 165.

propose to apply the same principles to the 900 MHz SMR auctions.¹⁴² Under this proposal, applicants would not be permitted to make any major modifications to their applications, including changes in markets and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction. Applicants could modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes would not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.¹⁴³ In addition, applications that are not signed would be dismissed as unacceptable.

106. Upon reviewing the short-form applications, we propose to issue a public notice listing all defective applications and applicants with minor defects would be given an opportunity to cure and resubmit a corrected version. After reviewing the corrected applications, the Commission would release a second public notice announcing the names of all applicants whose applications have been accepted for filing. These applicants would be required to submit an upfront payment to the Commission, as discussed below, to the Commission's lock-box by the date specified in the Public Notice, which generally would be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission would issue a third public notice announcing the names of all applicants that have been determined as qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned would not be identified on this Public Notice as a qualified bidder. Each applicant listed on this public notice would be issued a bidder identification number and further information and instructions regarding auction procedures. We seek comment on the proposals discussed above.

3. Upfront Payments

107. We concluded in the *Auctions Second Report & Order* that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate.¹⁴⁴ By requiring such a payment, we also help to ensure that any bid withdrawal or default penalties are paid. We tentatively conclude that the standard upfront payment formula of \$0.02 per MHz-pop, based on the number of 10-channel blocks in each MTA identified by an applicant on its Form 175, is appropriate for the 900 MHz SMR

¹⁴² Commission Announces that Mutually Exclusive "Short Form" Applications (Form 175) to Participate in Competitive Bidding Process (Auctions) are Treated as Exempt for *Ex Parte* Purposes, *Public Notice*, 9 FCC Rcd 6760 (1994).

¹⁴³ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion & Order*, PP Docket No. 93-253, 9 FCC Rcd 7345 (1994) (*Auctions Second Memorandum Opinion & Order*) at ¶ 52.

¹⁴⁴ *Auctions Second Report & Order* at ¶ 171.

service.¹⁴⁵ Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses (*i.e.*, MTAs with fewer pops), or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. If licenses covering the nation are being auctioned simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intended to bid on licenses covering the entire nation in a single bidding round. The \$0.02 per MHz-pop formula also works well with the Milgrom-Wilson activity rule that we propose to employ in the 900 MHz SMR auction, as described in ¶¶ 87-93, *supra*. In the initial Public Notice issued prior to the auction, we would announce population information corresponding to each license to enable bidders to calculate their upfront payments. We seek comment on these proposals.

4. Down Payment and Full Payment

108. In the *Auctions Second Report & Order*, we established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.¹⁴⁶ We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while not being so onerous as to hinder growth or diminish access.¹⁴⁷ We also determined that this amount was appropriate for the broadband PCS auctions.¹⁴⁸ We believe that the reasoning employed in those Orders is equally applicable to the 900 MHz SMR service. Thus, we tentatively conclude that, with the exception of designated entities eligible for installment payments (as proposed at ¶¶ 135-140, *infra*), winning bidders in 900 MHz SMR auctions must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). Under this proposal, if the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit would be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies would be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder would be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the penalty, any excess deposit would be refunded. Upfront payments would be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to

¹⁴⁵ Each 10-channel block accounts for .025 MHz.

¹⁴⁶ *Auctions Second Report & Order* at ¶ 190.

¹⁴⁷ *Id.*

¹⁴⁸ *See Auctions Fifth Report & Order* at ¶ 73.

acquire. We seek comment on these proposals.

109. We propose to require winning bidders to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners generally would be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the license is ready for grant. Under this proposal the Commission would grant the license within ten (10) business days after receiving full payment. We seek comment on this proposal.

110. We propose to subject an auction winner that is eligible to make payments through an installment plan (*i.e.*, designated entities, as proposed at ¶¶ 133-134, *infra*) to different payment requirements. Such an entity would be required to bring its deposit with the Commission up to five percent of its winning bid after the bidding closes, and would have to pay an additional five percent of its winning bid to the Commission within five (5) business days following public notice that the license is ready for grant. The Commission would then grant the license within ten (10) business days after receiving the five percent payment.

5. Bid Withdrawal, Default and Disqualification

111. As we have determined in the *Auctions Second Report & Order*, there must be a substantial penalty assessed to bidders if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due. Although we concluded that payment of *all* amounts that a bidder has on deposit may be too severe in many cases, we devised alternative disincentives for withdrawal, default, or disqualification.¹⁴⁹ We tentatively conclude that these procedures, found in Sections 1.2104(g) and 1.2109 of the Commission's Rules, are appropriate for the 900 MHz SMR auction as well. Accordingly, we propose that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed would be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid. We seek comment on this proposal.

112. If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount made subsequent to the withdrawal, in that auction. Under our proposal, if the subsequent high bidder also withdraws its bid, that bidder would be required to pay a penalty equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead

¹⁴⁹ See *Auctions Second Report & Order* at ¶ 197.

offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we propose not to hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

113. After bidding closes, we propose to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.¹⁵⁰ The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. Under this proposal, we would hold deposits made by defaulting or disqualified auction winners until full payment.

114. We believe that these payment requirements will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.¹⁵¹

115. If the MTA winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then we tentatively conclude that the Commission will re-auction the license.¹⁵² Under this proposal, if the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels. If only a small number of relatively low-value licenses are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits. We seek comment on the proposals discussed above.

6. Long-Form Applications

116. If the winning bidder makes the down payment in a timely manner, we propose the following procedures: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten (10) business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form

¹⁵⁰ See 47 C.F.R. §§ 1.2104(g), 1.2109.

¹⁵¹ See *Auctions Second Report & Order* at ¶ 198.

¹⁵² See *id.* at ¶ 204.

application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the Form 600, designated entities will be required to submit evidence to support their claim to any special provision available for designated entities described in this Order. This information may be included in an exhibit to FCC Form 600. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility for bidding credits, installment payment options, and other special provisions. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.¹⁵³ We seek comment on this proposal.

7. Petitions to Deny and Limitations on Settlements

117. As we have determined, the petition to deny procedures in Section 90.163 of the Commission's Rules, adopted in the *CMRS Third Report & Order* will apply to the processing of applications for the 900 MHz SMR service. Thus, a party filing a petition to deny against a 900 MHz SMR application will be required to demonstrate standing and meet all other applicable filing requirements. We have also adopted "greenmail" restrictions in Section 90.162 to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 900 MHz SMR applicants. Thus, we will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

118. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.¹⁵⁴ In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence.

8. Transfer Disclosure Requirements

119. In Section 309(j), Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."¹⁵⁵ In the *Auctions Second Report & Order*, the Commission adopted safeguards

¹⁵³ See generally 47 C.F.R. §§ 90.163-90.166.

¹⁵⁴ *Auctions Second Report & Order* at ¶ 202.

¹⁵⁵ 47 U.S.C. § 309(j)(4)(E).

designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.¹⁵⁶ We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."¹⁵⁷ Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not.¹⁵⁸

120. We tentatively conclude that the transfer disclosure requirements of Section 1.2111(a) should apply to all 900 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant would be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the *Auctions Second Report & Order*, we would give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.¹⁵⁹

9. Performance Requirements

121. The Budget Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."¹⁶⁰ In the *Auctions Second Report & Order*, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. We tentatively conclude that the coverage requirements that we adopt in this Order for the 900 MHz SMR service (discussed at ¶¶ 38-43, *supra*) are sufficient to address the spectrum warehousing concern. As discussed *infra*, failure to meet these requirements will result in automatic cancellation of license. Accordingly, propose to adopt no additional performance requirements for the 900

¹⁵⁶ *Auctions Second Report & Order* at ¶¶ 210-226, 258-265.

¹⁵⁷ See House Report at 257; *Auctions Second Report & Order* at ¶ 214.

¹⁵⁸ See 47 C.F.R. § 1.2111(a).

¹⁵⁹ See *Auctions Second Report & Order* at ¶ 214. We note that these transfer disclosure requirements are in addition to the unjust enrichment provisions discussed in this Order at ¶¶ 143-144, *infra*.

¹⁶⁰ Budget Act, § 6002 (a), 107 Stat. 312 (1993), 47 U.S.C. § 309(j)(4)(B).

MHz SMR service. We seek comment on this proposal.

D. Treatment of Designated Entities

1. Overview and Objectives

122. Congress provided that, in developing competitive bidding procedures, the Commission shall consider various congressional objectives and consider several alternative methods for achieving them. Specifically, the auction statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."¹⁶¹ Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."¹⁶² Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."¹⁶³ The statute also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."¹⁶⁴ To achieve this goal, the statute indicates that the Commission should "consider the use of tax certificates, bidding preferences, and other procedures."¹⁶⁵

123. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned

¹⁶¹ 47 U.S.C. § 309(j)(3)(B).

¹⁶² *Auctions Second Report and Order* at ¶ 227.

¹⁶³ 47 U.S.C. § 309(j)(4)(A).

¹⁶⁴ 47 U.S.C. § 309(j)(4)(D).

¹⁶⁵ *Id.*

by members of minority groups and women."¹⁶⁶ The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."¹⁶⁷ More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."¹⁶⁸

124. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments were clearly intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women."¹⁶⁹ It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."¹⁷⁰

125. In addition, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."¹⁷¹ As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."¹⁷²

126. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Second Report & Order* eligibility criteria and general rules that would govern the special measures for designated entities. We also identified several measures,

¹⁶⁶ House Report at 254.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 255.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

¹⁷² § 331(b)(2),(3).

including installment payments, spectrum set-asides, bidding credits and tax certificates, from which we could choose in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

127. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels¹⁷³ in the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels;¹⁷⁴ in the broadband PCS auction, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of qualifying designated entity that applied (*i.e.*, a small business would receive a 10 percent bidding credit, a business owned by minorities and/or women would receive a 15 percent bidding credit, and a small business owned by women and/or minorities would receive an aggregated bidding credit of 25 percent),¹⁷⁵ and all entrepreneurs' block licensees would be eligible for varying degrees of installment payments.¹⁷⁶ For the Interactive Video and Data Service (IVDS), we adopted a 25 percent bidding credit for one license in each market for women-owned and minority-owned businesses¹⁷⁷ and installment payments for small businesses.¹⁷⁸ The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we

¹⁷³ *Auctions Third Report and Order* at ¶ 72.

¹⁷⁴ *Id.* at ¶ 87. See implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175 (1994) at ¶ 58.

¹⁷⁵ *Auctions Fifth Report & Order* at ¶ 133. See also *Auctions Fifth Memorandum Opinion & Order* at ¶ 99.

¹⁷⁶ *Auctions Fifth Memorandum Opinion & Order* at ¶ 103.

¹⁷⁷ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994)(*Auctions Fourth Report & Order*) at ¶ 39.

¹⁷⁸ *Id.* at ¶ 53.

established provisions necessary to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

128. As in other auctionable services, we fully intend in the 900 MHz SMR service to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Accordingly, in balancing the congressional objectives set forth in the auction statute, we tentatively conclude that bidding credits, reduced down payments and installment payments should be made available to small businesses -- including those owned by minorities and women and small rural telephone companies -- on all 900 MHz SMR channel blocks in each MTA. In addition, to facilitate the introduction of service to rural areas, we propose to allow rural telephone companies to obtain geographically partitioned 900 MHz SMR licenses in areas where they provide telephone service, similar to the program adopted in broadband PCS.¹⁷⁹

2. Bidding Credits

129. Bidding credits allow eligible designated entities to receive a payment discount for their winning bid in an auction. In the *Auctions Second Report & Order*, we determined that competitive bidding rules applicable to individual services would specify the designated entities eligible for bidding credits and the amounts of the available bidding credits for that particular service.¹⁸⁰ In the *Auctions Third Report & Order*,¹⁸¹ we determined that eligible designated entities in the nationwide narrowband PCS auction would receive a 25 percent bidding credit. In the regional narrowband PCS auction designated entities would receive a 40 percent bidding credit.¹⁸² For broadband PCS, the bidding credits would vary according to the type of qualifying designated entity that applied (*i.e.*, a small business received a 10 percent bidding credit, a business owned by minorities and/or women received a 15 percent bidding credit, and a small business owned by women and/or minorities received an aggregated bidding credit of 25 percent).¹⁸³ For the Interactive Video and Data Service

¹⁷⁹ *Auctions Fifth Report and Order* at ¶¶ 148-153.

¹⁸⁰ *Auctions Second Report & Order* at ¶ 241.

¹⁸¹ *Auctions Third Report & Order* at ¶ 72.

¹⁸² *Auctions Third Memorandum Opinion & Order & Further Notice* at ¶ 58.

¹⁸³ *Auctions Fifth Report & Order* at ¶ 133. See also *Auctions Fifth Memorandum Opinion & Order* at ¶ 99.

(IVDS), we adopted a 25 percent bidding credit in each market for women-owned and minority-owned businesses.¹⁸⁴

130. We propose to offer a 10 percent bidding credit to small businesses bidding on any of the ten-channel blocks within each MTA. We believe these bidding credits will help, along with other provisions proposed below, achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain licenses in the 900 MHz SMR auction, while taking into account the concerns of incumbents within the DFAs. While some discount is needed to put small businesses on equal footing with other larger applicants, considering the large number of licenses available in this service (*i.e.*, 1,020), we believe it may be unnecessary to provide a higher bidding credit, such as that provided for certain designated entities in regional narrowband PCS.¹⁸⁵ In narrowband PCS and broadband PCS, we limited the channel blocks on which bidding credits were available to designated entities.¹⁸⁶ In IVDS, we permitted the use of bidding credits on both available channels, yet imposed a limit of one bidding credit per service area.¹⁸⁷ Due to the characteristics of the 900 MHz SMR service, we are proposing a departure from these other service-specific auction rules. We propose to offer bidding credits for eligible designated entities on all channel blocks in each MTA, rather than limiting this measure to certain blocks. Due to the presence of incumbents throughout all blocks, it may be impractical to choose certain blocks for bidding credits that would not affect the incumbents occupying those blocks. Additionally, we believe that we would be providing greater opportunities for small businesses if we provide bidding credits across all blocks.

131. We seek comment on this proposal. Specifically, is a 10 percent credit sufficient to enhance bidding opportunities? Also, how should the presence of incumbents on all channel blocks affect the availability of bidding credits on all blocks? We observe that in auctions conducted to date, bidding credits have been available for women and minority-owned applicants, with installment payments available for both women and minority-owned businesses and small businesses. The Commission has adopted a 10 percent bidding credit for broadband PCS applicants on the C and F blocks.¹⁸⁸ In auctions where bidding credits for women and minorities have been available, participation and success in spectrum-based auctions have varied. For example, in nationwide narrowband PCS, a 25 percent bidding

¹⁸⁴ *Auctions Fourth Report & Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) at ¶ 39.

¹⁸⁵ *Auctions Third Memorandum Opinion & Order & Further Notice* at ¶ 58.

¹⁸⁶ *Auctions Third Report and Order* at ¶ 72 (narrowband PCS); *Auctions Fifth Report & Order* at ¶ 131 (broadband PCS).

¹⁸⁷ *Auctions Fourth Report & Order* at ¶ 39.

¹⁸⁸ *Auctions Fifth Report and Order* at ¶ 130.